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IN THE

Supreme Court of the United States

October Term, 1966

No. [redacted] 226

EUSTACE ROPER, NUNZIO PROVENZANO and SALVATORE BRIGUGLIO,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONSE OF THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI

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The People of the State of New York, by FRANK S. HOGAN, District Attorney of New York County, respond as follows:

1. This case does not pose a substantial federal question for cognizance on certiorari.

2. The New York Court of Appeals unanimously affirmed the judgment of conviction of the petitioners herein, New Jersey Teamsters Union officials, of Attempted

Grand Larceny in the First Degree by False Pretenses, in that they had falsely represented to a New York employer that one Silverman, President of a picketing New York local of their union, had agreed to accept a $10,000 bribe in order to enter into an "easy" union contract, and that Silverman had requested that it be paid to the defendants for delivery to him. (The petitioners were sentenced to serve a term of two to four years in State Prison.) In so affirming, the Court said, insofar as here applicable (17 N. Y. 2d 711):

> "The judgments of the Appellate Division should be affirmed. *We need not decide* whether entrapment is currently recognized as a defense in New York since, *even if it is*, the present case did not create an issue of fact requiring submission to the jury (cf., McKinney's Revised Penal Law, Sec. 35.50, effective September 1, 1967)." (emphasis supplied).

It held, by the same token, that failure to submit the issue of entrapment to the jury did not violate the defendants' constitutional rights.

In denying their application for bail, Mr. Justice Harlan wrote:

> "I consider it too unlikely that certiorari will be granted to warrant my delaying execution of this state sentence."

3. Contrary to the petitioners' claim premised on the assertion that "there is undisputed evidence that it was the prosecutor who, through his agent, made the *initial proposal* to defendant that he embark on the unlawful

course of conduct resulting in the defendant's indictment" [petition, p. 2 ("Questions Presented I (1)"]: The record evidence shows that *long before* Braun (a New York employer, whose plant, employees and customers were plagued by personal injury and property damage by a picketing New York Local 810 of the Teamsters Union) had conferred thereon with the district attorney, he, Braun had held a phone conversation with the defendant Roper —a friend's friend—who was an official of a New Jersey local of the Teamsters. Braun had detailed to him the violence inflicted by the 810 people, and asked Roper if there was "anything he [Roper] could do to help us get rid of these people" (714),* "anything we can do?" (715). What Roper had said was not merely that he would try to "help" Braun (petition, Appendix D, 7A), but he proposed to Braun that when he, Roper, would see someone from that "outfit," and "maybe we can get you straightened out," that *"It may cost a couple of bucks"*—$500 or $1000—*so "they" can get their "expenses;"* that "they" were a "pretty lousy bunch" "inclined to play rough" (713-716; Assistant District Attorney Perrin's notes of November 21 conference with Braun, Defendants' Exh. Q). The foregoing was hardly consonant with initial innocence. Thereafter, *and before the prosecutor entered the picture,* the testimony shows that Roper was actively contacting various people in the matter, including the defendant Provenzano, who was a friend of Silverman, President of the picketing Local 810, and seeing Silverman personally (1727, 1784; 258-9, 260, 500). Indeed, when the district attorney launched his investigation and sought to get to the bottom of the matter—to discover, through Roper,

* Unless otherwise indicated, references are to the printed record on appeal in the New York Court of Appeals.

who it was who was pulling the strings of violence and whether the motivation of the manipulator was illegal—including, as the defendants put it, "if the officials of the *picketing local* were seeking a bribe, or attempting a shakedown" (defendants' brief in Court of Appeals, p. 6; emphasis supplied), and Braun at the prosecutor's suggestion contacted Roper, Roper had only shortly before that been in contact with Provenzano on the matter (1784). Far from having "forgotten all about Braun and his original appeal for help" (petition, p. 8A), Roper's telephone conversation (Exh. 8A) showed that once he satisfied himself as to who his caller was, he evinced a ready complaisance. Thus, when Braun reminded him of his, Braun's previous wish "if there's some way to get this guy off our back" (Exh. 8A, p. 2) and Braun wondered if Roper wanted to "talk to the fellow again" and see if there was "something we could work out," Roper said "all right" (Exh. 8A, p. 2), and on Braun saying he did not want "this union," and doubted from their actions if they wanted to unionize this shop, and wondered "if this guy got some figure in mind," Roper responded that he would "get in touch with the guy right now" (*ibid.*, p. 3). Suggesting that Braun try an angle with Roper's friend at NLRB, Roper declared, "I'll try this other angle—and see what we can work out" (Exh. 8A). Thereafter, Roper was an eager beaver (Exhs. 8B, 8C, 8D, 8E) coming back with a claimed proposal from Silverman's 810 for an easy contract with that union—a "contract you can live with," for which, "they" wanted "important dough" a "ten grand" payoff (749-50); an enterprise Roper avidly promoted, joined by the other defendants, who also were offi-

cials of New Jersey Teamster locals (753, 762, 765-80, 782, 786-7, 793, 795).

4. In any event, as establishing the frivolousness of this petition, suffice it to say that the defendants were *acquitted* of the charge of conspiring to bribe President Silverman as labor representative of Local 810 with $10,000 to influence him to give an easy union contract; but were convicted of attempted grand larceny by falsely pretending that Silverman had agreed to take $10,000 for the "easy union contract"—a crime whose origin of intent was completely within the secret recesses of the defendant Roper's mind and that of his confederates, unbeknown to the prosecution or Braun.

For, as we stated in our Court of Appeals brief (p. 17):

> Even assuming only for argument's sake, without conceding in any wise, that it might be a defense in New York if the criminal intent to commit the crime of which a person was convicted originated in the mind of an agent of the state with the purpose of persuading the defendant to commit that crime, we note that even on the defendants' view here, the purpose of the prosecutor was to see, *if the officials of the picketing local* and particularly Silverman, *were seeking a bribe or attempting* a shakedown. Thus, the most that could have been argued on a claim of entrapment was that the defendants may have been encouraged in *conspiring to give a bribe* to Silverman. The defendants were, however, in any event, *acquitted* of the conspiracy charge. What they were convicted of, was a brazen attempt to steal by *falsely represent-*

ing that Silverman had agreed to be bribed; an intent and act originating in the secret recesses of the minds of Roper and his confreres unbeknown to prosecutor or complainant.

The offenders acted of their own volition in making *false* representations and were simply caught in their own devices, even assuming without conceding here the governmental use of a decoy intended to discover a conspiracy to bribe. Even where entrapment is recognized as a defense, as in *State* v. *Marquardt,* 139 Conn. 1, 8, relied on by the defendants, "The principle referred to as entrapment places no limitation upon the right of the officers of the law to obtain evidence of any crime originating in the mind of another." Indeed, since the defendants themselves concede that where the 'origin of intent' is with the defendants, and not with the authorities, the defense of entrapment is not available (their p. 26); the claim of entrapment fails here." (emphases quoted)

5. Contrary to the petitioners' claim (petition, p. 5; also, p. 3) that the trial court "refused" to "instruct the jury on entrapment" because of the "commonly held notion in New York that entrapment is not a defense," we find no showing that the specific charge which was requested (2408) was denied on that ground. Indeed, the defendants throughout the trial were given full leeway to offer any evidence as to claimed "entrapment"; in conformity with the trial court's having volunteered, early in the trial, to deal with the subject of entrapment in its charge; for, as the petitioners themselves acknowledged in their New York Court of Appeals brief (p. 16): "When the subject of entrapment was raised early in the trial, the court had volunteered a promise to deal with the mat-

ter in its charge'' (318). Moreover, respecting their quotation from *Sorrells* v. *United States* (1932) 287 U. S. 435, at 451, that a defendant must be ''permitted to prove'' that he is a ''person otherwise innocent'' (petition, p. 5), there was no showing that they were precluded from offering any such proof, or any other proof on their entrapment claim.

6. We observe, merely in passing, that this Court has concededly not declared ''entrapment'' to be a due process defense. *Sorrells* v. *United States,* 287 U. S. 435, and *Sherman* v. *United States,* 356 U. S. 369, were decided on the facts therein, as a matter of public policy in the construction of federal statutes. The petitioners' claim (p. 6), that there is a conflict between the Seventh and Ninth Circuits as to whether ''entrapment'' is a matter of due process, is inaccurate. *United States* v. *Bailey* (CCA 7th 1964) 331 F. 2d 218, 220 (holding that it is not, citing 5th, 8th, 9th and 10th Circuits), points out with regard to *Banks* v. *United States* (CCA 9th 1957) 249 F. 2d 672 (on which the defendant relies), that in the second *Banks* case (258 F. 2d 318, at 319 (1958), cert. den. 358 U. S. 886, the Ninth Circuit held that failure of the court to pass on the merits of the entrapment claim did not involve a violation of the constitutional rights of appellant. In any event, as the petitioners acknowledged, (1) the defense is not available where the ''origin of the intent'' is with the defendant, and not with the authorities (Ct. App., 26); (2) the known predisposition of a defendant to commit the offense for which he is charged serves to refute a claim of entrapment (Ct. App. p. 26), and (3) even the setting of a trap by the authorities for one already bent on committing a

crime does not constitute entrapment (*ibid.*). The defense of "entrapment" would not have been available on the instant facts even in jurisdictions whose highest courts, finding occasion to decide thereon, recognized such defense (cf., New York L. 1965, *supra,* noted by the Court of Appeals, which sets forth the legislative definition of entrapment, effective Sept. 1, 1967).

7. Indeed, the petitioners can hardly claim here that New York has "failed to recognize" "entrapment" as a defense (petition, pp. 2, II). While the People argued in the Court of Appeals that it was not a defense (but that even if it were, the defense of "entrapment" would not have been available on the instant facts in jurisdictions allowing such defense), the petitioners, in their Court of Appeals brief, declared that although "our appellate courts have not hitherto had the occasion expressly to announce their adherence" to the doctrine of entrapment (their Court of Appeals brief, p. 20), "this is by no means to say that the courts of this state do not recognize the defense" (*ibid.,* 16; cases at 16 and 20). Moreover, the petitioners, analyzing the cases, urged that "there is no basis in the decided cases for supposing that the defense of entrapment is not available in the New York State courts" (p. 21). In any event, this case does not provide the vehicle for deciding whether "entrapment" is a due process defense, since, as the New York Court of Appeals has here stated [a court which the petitioners rightly acknowledged to be "in the forefront of those which have vigorously promoted requirements of fundamental fairness in police methods, and have just as forthrightly condemned infringements on basic human rights" (their

Court of Appeals brief, p. 20)], "even if" entrapment is currently recognized as a defense in New York,

> "the present case did not create an issue of fact requiring submission to the jury (cf., Revised Penal Law, §35.40, enacted by L. 1965, ch. 1030, eff. Sept. 1, 1967)."

Conclusion

Wherefore, the People pray that the petition for certiorari be denied.

Respectfully submitted,

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New York County

HAROLD ROLAND SHAPIRO
Assistant District Attorney
Of Counsel

July, 1966

Appendix A

People's Response in the Court of Appeals to Petitioners' Motions for Reargument and to Amend Remittitur

April 20, 1966

Honorable Raymond J. Cannon, Clerk
Court of Appeals
Albany 7, New York

Re: *People* v. *Roper Provenzano* and *Briguglio*
(re: defendants-appellants' application for reargument and to amend remittitur)

Dear Mr. Cannon:

We have read the application and see nothing substantially new warranting reargument. We are perfectly content to leave the determination of the application to the Court. We do not, of course, necessarily acquiesce in any claim of the defendants-appellants, in their application, as to our position regarding the law or the facts, or as to the facts and applicable law. Our position is set forth in our main brief and the Court is familiar with the proceedings herein. We particularly note, however, one instance in which the defendants' statement of the case is not completely accurate. We refer to their statement (p. 6) that "the prosecutor does not dispute the existence of evidence that the defendants-appellants were entrapped." See our main brief at p. 17, 1st sentence of 2nd full paragraph, and the last sentence before the 1st full paragraph on our p. 21.

Regarding their application to amend the remittitur, we concede that this Court would necessarily have had to pass on the question whether the trial court's failure to submit to the jury the question of entrapment on the instant facts, was itself a denial of due process. This court held, after noting that it need not "decide whether entrapment is currently recognized as a defense in New York," that "even if it is, the present case did not create an issue of fact requiring submission to the jury (cf., McKinney's Revised Penal Law, §35.40, effective, September 1, 1967)" (Memorandum opinion). We do not believe that the Court was required to pass on whether entrapment is a constitutionally mandated defense.

Yours respectfully,

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HRS/hr
cc: Harris B. Steinberg, Esq.
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